CITY OF REDDING

IBLA 85-119 Decided March 11, 1986

Appeal from a decision of the Redding Resource Area Office, Bureau of Land Management, setting the annual rental fee for right-of-way permit CA 14733, based on the fair market rental value of the land subject to the right-of-way.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Fees--Rights-of-Way: Appraisals

   BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals--Words and Phrases

   "Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

APPEARANCES: Randall A. Hays, Esq., City Attorney, Redding, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The City of Redding appeals from a decision of the Redding Resource Area Office, Bureau of Land Management (BLM), dated September 20, 1984, that the annual rental fees contained in a right-of-way offer dated May 30, 1984, should not be reduced. 1/ In the offer BLM requested appellant to "show

1/ In an apparent typographical error, the BLM decision refers to a 43 CFR 1803.1-2, rather than 43 CFR 2803.1-2.

* * * concurrence by signing both the original and duplicate of the proposed grant, in the space provided, and [return] them to this office, together with the estimated annual rental of $ 4,400.00." 2/

In its statement of reasons, appellant notes it has attempted to secure either a right-of-way or a fee grant of a federally owned 11-acre parcel upon which the appellant would locate a water treatment plant to accommodate demand for water service in and around the growing community of Redding, California. Appellant further states that the City of Redding is currently responsible for providing water not only within the Redding city limits but to citizens in areas outside the city limits through coordinated activities with Shasta County. Appellant takes issue with BLM's position that rental for the right-of-way must be paid because the city will use the property to provide water, for which the city charges a fee. Appellant contends the exemption found in 43 CFR 2803.1-2(c)(1) applies to the City of Redding and the cases cited by BLM are distinguishable because the rights-of-way in those cases were sought by private organizations which sought Government property to make a profit, whereas in this case a local governmental entity is seeking to utilize property in the public domain, for its citizens and others.

[1] Section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(g) (1982), 3/ provides in applicable portion:

> (g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land

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2/ The actual provision of the proposed grant reads as follows:

"9. In consideration for these uses, the holder shall pay rental to the Bureau of Land Management, the sum of four thousand four hundred dollars ($ 4,400) for the period from 1984, to 1985, and thereafter annually four thousand four hundred dollars ($ 4,400). However, this estimated annual rental may be readjusted once a formal appraisal is completed. Once the annual rental has been established it shall be subject to reappraisal every five years and may be adjusted accordingly to place the charges at the current fair market value. The right-of-way is not in force unless the holder has paid the rental fee in advance."

3/ In 1984, the FLPMA rental provision for rights-of-way, 43 U.S.C. § 1764(g) (1982), was amended to waive charges for electric or telephone facilities financed pursuant to the Rural Electrification Act, as amended, 7 U.S.C. § 904, 922 (1982). This amendment specifically limited the waiver to electric and telephone utilities financed by the Rural Electrification Act of 1936, as amended (7 U.S.C. § 901 (1982)), and extensions from such facilities.

> for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.
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> The decision which is the subject of this appeal states, in part:
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> The Interior Board of Land Appeals has held in Tri-State Generation and Transmission Association, 63 IBLA 347, 89 I.D. [227] (1982), and again in Socorro Electric Cooperative, Inc., 64 IBLA 65 (1982) that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

We agree with BLM's statement that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. Since the City of Redding is not an agency of the Federal Government, and the cost of collection not unduly large, BLM properly determined the City of Redding does not qualify for exemption from rental fees.

Congress has stated an intent to continue its policy of favoring local governments by allowing fees for rights-of-way at less than fair market value. See 1976 U.S. Code Cong. & Ad. News 6193, 6194. However, the relevant regulation, 43 CFR 2803.1-2(c)(1), states:

> (c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:
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> (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges. [Emphasis added.]

[2] Appellant is correct in its conclusion that the cases cited by BLM did not address the issue of whether a municipal government should be afforded reduced charges. Those cases resulted from appeals by electrical cooperatives rather than a local government. However, the language of 43 CFR 2803.1-2(c)(1) excludes municipal utilities as well as cooperatives. There can be no argument that regulatory provision applies to a municipal utility.

A municipal utility has been defined as "a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service." 73B C.J.S. Public Utilities § 2 at 127. Thus, a municipal utility is an agency or branch of a political subdivision established by the political subdivision to provide such services. Appellant seeks to obtain the right-of-way to facilitate its treatment and delivery of water to homes and businesses in and around Redding, and thus the purpose for the right-of-way must be for use by a municipal utility. There is nothing in the record that the principal source of revenue is anything other than customer charges. Appellant has not alleged otherwise.

Appellant contends there should be a distinction between a water system operated by a municipality and a water system operated by a water authority established by a municipality. We find no statutory or regulatory basis for this distinction. While a strained interpretation of the regulations may support the argument, logic dictates otherwise. There is no justifiable reason, as a matter of policy, to differentiate between a municipality and a municipal agency when interpreting the applicable provisions. 4/ The clear intent is that when a political subdivision (other than an agency of the Federal Government) provides utility service, it is able to obtain reduced rental only if the principal source of revenue derived from such service is from a source other than customer charges. BLM properly set the fee based upon the fair market rental of the lands subject to the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge.

4/ It makes little difference whether the line items in a city budget refer to income and expense incurred in water service or to the income and expense incurred by a subsidiary authority. For example, if the right-of-way was for a public park, reduced fees would probably be available, even though the park was operated by a park authority, rather than the city.